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Supreme Court, U.S.
FILED

No. 08-185

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In The

Supreme Court of the United States

COLIN McANDREW,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Twelfth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court that resolves an ineffective assistance of counsel claim without determining that counsel's explanations for his conduct are sound and supported by the record abdicates its duties pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).

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PETITION FOR A WRIT OF CERTIORARI

Colin McAndrew respectfully petitions for a writ of certiorari to review the judgment of the Twelfth Court of Appeals of Texas.

OPINIONS BELOW

The findings of fact and conclusions of law of the Houston County Court at Law denying habeas corpus relief are not reported (Appendix B). The opinion of the Twelfth Court of Appeals of Texas affirming the denial of habeas corpus relief is not reported (Appendix A). The order of the Texas Court of Criminal Appeals refusing discretionary review is not reported (Appendix C).

JURISDICTION

The Texas Court of Criminal Appeals refused discretionary review on May 14, 2008. This petition is being filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issue

This case offers the Court an opportunity to clarify the proper application of *Strickland v. Washington*, 466 U.S. 668 (1984), which Texas courts habitually misapply. Competent defense counsel has a duty to make the trial an "adversarial testing process" and to make sound strategic decisions. *Id.* at 688-89. Adjudication under *Strickland*'s relatively open-ended "objectively reasonable counsel" standard will rarely yield an overt "split" among the lower courts as a matter of law. Nonetheless, application of the *Strickland* standard may yield divergent tendencies in different jurisdictions, and in such instances this Court must intervene to clarify the proper application of the standard. The present case is the latest in a series of cases in which Texas courts have tortured the *Strickland* standard.

The present case exemplifies the manner in which Texas courts deviate from the *Strickland* standard in two important respects. First, the Twelfth Court of Appeals blindly accepted counsel's testimony that certain conduct was based on "trial strategy" without analyzing whether that strategy

was sound. The courts ignored that strategic decisions must be sound to be constitutionally adequate. Unless this Court reiterates this point, Texas courts will continue to accept absurd explanations from trial counsel. Second, the Court of Appeals engaged in the unacceptable tactic, habitually employed by Texas courts, of creating strategic reasons for counsel's conduct that are not supported by the record and directly contradict his admissions that his conduct was not strategic. In so doing, the Court of Appeals, like other Texas courts, ignored this Court's clear command in *Strickland*.

Exacerbating the problem is the Texas Court of Criminal Appeals' failure to correct this gross misapplication of *Strickland*. In many instances, that court is responsible for perpetuating it. As in most jurisdictions, claims of ineffective assistance of counsel in Texas are usually litigated in post-conviction habeas corpus proceedings. In the overwhelming majority of those cases, the Court of Criminal Appeals denies relief without written order on the trial court's findings of fact and conclusions of law without a hearing. The findings and conclusions are often drafted by the habeas prosecutor and assert that trial counsel did not perform deficiently because his conduct was based on some strategy but ignore whether the purported strategy was sound. In many instances, the findings and conclusions ascribe a strategic reason to counsel's conduct that is not supported by the habeas record or directly contradicts counsel's admissions that particular conduct was not strategic. The Court

of Criminal Appeals routinely denies relief based on these types of findings and conclusions. Most of these decisions are unreported and are not reviewed by this Court, which is not likely to grant certiorari from a state trial court's unreported findings and conclusions.

This case, in which the Court of Criminal Appeals refused discretionary review of the Court of Appeals' decision, further exemplifies the failure to correctly apply this Court's directive in *Strickland*. Counsel asserted in the state habeas corpus proceeding that he employed a strategy of "damage control" to avoid "drawing attention" to petitioner's unkempt appearance at the expense of challenging the prosecution's case. Counsel did not explain what a "damage control" defense entails.

Assuming *arguendo* that counsel employed a "damage control" strategy, it was unsound. Even if petitioner appeared unkempt and hostile, as counsel testified, the Court of Appeals cited no authority for the proposition that counsel may abdicate his constitutional duty to zealously represent the defendant just because he thinks that the jury disapproves of the defendant's appearance and mannerisms. If such a standard were constitutionally permissible, a criminal defense lawyer would have a built-in excuse to never object. Moreover, the Court of Appeals blindly accepted counsel's absurd assertion that, because he did not challenge the prosecution's case, the jury did not notice petitioner's appearance. Where petitioner testified and sat next to counsel in close

proximity to the jury, it is illogical to conclude, as did the Court of Appeals, that counsel had a sound strategy of not wanting to draw attention to petitioner. Finally, by counsel's rationale, if he disapproves of a defendant's appearance during the *voir dire* examination, he unilaterally decides not to seek an acquittal, even if the defendant has pled not guilty, and he does not challenge the prosecution's case in an attempt to "control the damage." Such a strategy is unsound and constitutionally inadequate.

It was unsound for counsel to allow the jury to hear clearly inadmissible, prejudicial testimony in an attempt to "control the damage" and not "draw attention" to petitioner, who pled not guilty, testified in his defense, and denied committing the offense. Likewise, it was unreasonable not to impeach the key prosecution witnesses where the verdict depended on whom the jury believed. The state court abdicated its duties pursuant to *Strickland v. Washington*. Accordingly, this Court should exercise its supervisory powers, grant certiorari, and summarily reverse the judgment of the Court of Appeals.

B. Procedural History

Petitioner was charged with misdemeanor assault causing bodily injury. He pled not guilty. A jury convicted him and assessed his punishment at one year in jail and a $4,000 fine, both probated for two years, on August 27, 2003.

The Twelfth Court of Appeals affirmed the conviction in an unpublished opinion issued on March 23, 2005. The Texas Court of Criminal Appeals refused discretionary review on November 9, 2005. *McAndrew v. State*, No. 12-03-00297-CR (Tex. App. – Tyler 2005, pet. ref'd).

Petitioner filed an application for a writ of habeas corpus on May 8, 2006. The trial court summarily denied relief on May 12, 2006. The Twelfth Court of Appeals reversed and remanded for an evidentiary hearing in an unpublished opinion issued on November 1, 2006. *Ex parte McAndrew*, No. 12-06-00179-CR (Tex. App. – Tyler 2006, no pet.). The trial court denied relief on March 7, 2007 (Appendix B). The Twelfth Court of Appeals affirmed the order denying relief in an unpublished opinion issued on January 31, 2008 (Appendix A). The Texas Court of Criminal Appeals refused discretionary review on May 14, 2008 (Appendix C). *Ex parte McAndrew*, No. 12-07-00134-CR (Tex. App. – Tyler 2008, pet. ref'd).

REASON FOR GRANTING THE PETITION

THE TWELFTH COURT OF APPEALS IGNORED THIS COURT'S DIRECTIVE IN *STRICKLAND V. WASHINGTON* TO DETERMINE WHETHER TRIAL COUNSEL'S EXPLANATIONS FOR HIS CONDUCT ARE SOUND AND SUPPORTED BY THE RECORD.

A. The Factual Background

Petitioner and Krystal Mitchell, his ex-wife, had five children who lived with Krystal and her present husband, James Mitchell (2 R.R. 20-22). Petitioner tried to pick up the children on December 14, 2002, but Krystal refused to let them leave and threatened to call the police (2 R.R. 23-26, 42). Petitioner and James had a physical altercation that resulted in an injury to James's nose (2 R.R. 28-29, 47, 64-70, 75-77). At issue were whether petitioner punched James in the nose and, if so, whether he acted in self-defense.

B. The State Habeas Corpus Proceeding

Petitioner contended in the state habeas corpus proceeding that trial counsel was ineffective in failing to object to inadmissible, prejudicial testimony; impeach the key prosecution witnesses; and object to the prosecutor's improper argument that was contrary to the court's charge.

1. Counsel's Defense Strategy

Counsel testified at the evidentiary hearing about his trial strategy.[1] He agreed that the verdict depended substantially on whether the jury believed petitioner or James and Krystal, and that it was important for the jury not to hear inadmissible evidence that portrayed petitioner as a bad person or a criminal generally; but he vacillated on whether it was important to impeach James and Krystal (E.H. R.R 44-46).

Counsel did not file a motion in limine to exclude extraneous offenses because he was not aware of any; it was his practice to file this motion only if he knew before trial about inadmissible, prejudicial evidence (E.H. R.R 37-38).[2] He did not object to this testimony because he purportedly learned either in law school

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[1] At the time of the hearing, counsel was an assistant district attorney in a small, rural county in the Texas Panhandle. He also was under indictment for felony misapplication of fiduciary property in Houston County, allegedly committed on October 15, 2002, during the same time period that he represented petitioner (E.H. R.R 21-22). He testified that he continues to prosecute while under indictment and does not believe that it is unethical to do so (E.H. R.R 24). He also has been sued by former United States Congressman Jim Turner for $59,000 in unpaid office rent incurred while he was in private practice in Houston County during the same time period that he represented petitioner (E.H. R.R 15-16).

[2] Counsel's explanation for not filing a motion in limine is unreasonable because he could have but did not request pre-trial notice of extraneous offenses pursuant to Texas Rule of Evidence 404(b).

or at a seminar that objecting to inadmissible, prejudicial evidence harms the defendant before the jury (E.H. R.R 39). He only objects to such evidence if he thinks it is necessary to do so after "reading the faces" of the jurors, the defendant, and the witness (E.H. R.R 41). Although his failure to object to this testimony waived the issue for appellate review, preservation of error was not part of his strategy (E.H. R.R 42). Indeed, he does not believe that constitutionally effective counsel should always object to inadmissible, prejudicial evidence.

Counsel decided to change strategies during the trial and not seek an acquittal, even though petitioner pled not guilty and testified that he did not assault James. Counsel did not testify that petitioner knew about and approved this critical change in strategy. He determined that the case "was a losing cause," that James and Krystal were credible, and that the jury had decided that petitioner was guilty before he testified (E.H. R.R 46-48).[3] Counsel went into a "damage control" mode and stopped trying to obtain an acquittal as early as the *voir dire* examination based on petitioner's appearance (E.H. R.R 54).[4] For that reason, he did not object to inadmissible, prejudicial testimony; impeach the key prosecution

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[3] It defies logic how counsel "knew" that the jury had decided to convict petitioner. Counsel testified that he could reach this conclusion because he "knew this jury" (E.H. R.R 48).

[4] Counsel testified that petitioner appeared unkempt and hostile; this assertion is not supported by the trial record.

witnesses; and object to the prosecutor's improper argument that was contrary to the court's charge.

2. Deficient Performance

a) Failure To Object To Inadmissible, Prejudicial Testimony

Krystal testified without objection on direct examination that she stepped between petitioner and James because petitioner "has a habit of hitting people when he's mad" (2 R.R 27-28). On cross-examination, counsel elicited that she and petitioner did not have a good relationship because he abused her for 14 years (2 R.R 38). Counsel should have objected because the answer was non-responsive and constituted inadmissible character testimony.

Counsel acknowledged that Krystal's testimony was inadmissible and that he did not intend to elicit it (E.H. R.R 51-52, 57). He conceded that it portrayed petitioner as a violent, tempermental wife-abuser; that it would enable the jury to conclude that petitioner was more likely to commit the charged offense; that it was not probative of whether petitioner assaulted James; and that it did not help the defense (E.H. R.R 56-58). However, it was not part of his strategy to prevent the jury from hearing testimony about petitioner's alleged prior misconduct.[5]

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[5] Counsel should have requested pre-trial notice of the State's intent to offer evidence of extraneous offenses and bad

(Continued on following page)

The Court of Appeals agreed that this testimony was inadmissible and that timely objections should have been sustained. Appendix A at 9a-10a. However, it concluded that counsel reasonably changed his strategy from obtaining an acquittal to "damage control" because he did not want to "draw attention" to petitioner's appearance and mannerisms, and that his decision not to object constituted sound strategy under the circumstances. Appendix A at 10a-12a. It accepted counsel's absurd explanation without critical analysis, as he could have asked to approach the bench or excuse the jury so he could object to this testimony outside the jury's presence. It failed to consider his concession that this testimony was inadmissible and prejudicial, which undermined his assertion that he made a strategic decision not to object to it.

b) Failure To Impeach The Key Witness With Her Written Statement

Krystal and James testified on direct examination that petitioner caused bodily injury by punching James in the nose (2 R.R 28, 46). Krystal gave a sworn, written statement to the police on the night of the incident that did not assert that petitioner

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acts and, upon receipt, filed a motion in limine to exclude inadmissible, prejudicial evidence before the jury could learn about it.

punched James in the face or nose (AX 4). Instead, she said, "Colin went to the side of me and knock [sic] James to the ground (*James says he missed*[,] grabbed James by the neck and knocked him to the ground)" (emphasis added). Counsel did not impeach Krystal with her prior inconsistent statement, which also would have indirectly undermined James's credibility. The prosecutor's summation focused on the alleged punch (2 R.R 92, 94, 97).[6]

Petitioner asserted that counsel's omission was deficient. Counsel conceded that he should have impeached Krystal with her statement and that, had he done so, he could have argued that she and James embellished their testimony and were not credible (E.H. R.R 61, 63, 67-68).

The Court of Appeals recognized that, "passing over the opportunity to impeach Krystal and James regarding their version of the facts was an omission of a very serious nature." Appendix A at 13a-14a. However, it concluded that counsel's decision not to impeach them was consistent with his strategy of

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[6] The prosecutor argued during summation that petitioner punched James "square in the nose" (2 R.R. 92); that petitioner lied when he testified that he did not punch James in the nose (2 R.R. 94); that petitioner wanted the jury to believe that James's testimony was false (2 R.R. 97); that James's bodily injury "came from a punch to the nose that [petitioner] started this fight with" (2 R.R. 97); that, "We didn't change the story at all," and, "We didn't make any change at all" (2 R.R. 97); and that James's and Krystal's "story is the only one that is believable" (2 R.R. 97).

"damage control."[7] Appendix A at 14a-15a. It inexplicably deferred to the trial court's legal conclusion that this strategy was reasonable:

> Finally, we are limited to reading the record before us and, therefore, are not in a position, without more, to adequately judge whether trial counsel's damage control defensive strategy, based on [petitioner's] appearance and mannerisms at trial, was a reasonable strategy. . . .

Appendix A at 15a. Texas appellate courts must review *de novo* a trial court's determination of mixed questions of law and fact that do not depend on credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Whether this strategy was sound is a legal conclusion that does not depend on counsel's credibility at the evidentiary hearing. The Court of Appeals did not explain how failing to impeach the key prosecution witness on the ultimate issue is consistent with a "damage control"

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[7] The Court of Appeals also observed that the written statement contained adverse information about petitioner unrelated to whether he assaulted James, implying that counsel may have decided not to impeach Krystal with the statement to avoid eliciting this adverse information. Appendix A at 14a. No evidence supports this conclusion, as counsel did not give this explanation. Furthermore, he could have used this specific portion of the statement to impeach Krystal without opening the door to the portion referring to inadmissible acts of misconduct allegedly committed by petitioner.

defense. It erred by deferring to this unreasonable legal conclusion.

c) Failure To Call Impeachment Witness

Krystal denied that she refused to let the children leave with petitioner because he was delinquent on child support payments (2 R.R. 31). Kara McAndrew, their 15-year-old daughter, gave a sworn, written statement to the police on the night of the incident asserting, "My mom wouldn't let [petitioner] pick us up because he wouldn't pay child support" (AX 5). Counsel did not call Kara to impeach Krystal.

Additionally, Kara's statement asserted that, during the altercation, her mother sent her inside to obtain a rifle; when she returned, James was on top of petitioner and yelled for her to shoot him (AX 5). Counsel recognized the impeachment value of this statement because he asked Krystal, "Your daughter was instructed by James to shoot . . . her father?" (2 R.R. 36). Krystal replied that petitioner told Kara to shoot James; counsel commented that Kara's "statement reflected different" (2 R.R. 36).[8] James testified similarly that petitioner told Kara to "shoot the son of a bitch," referring to James (2 R.R. 47). Counsel recognized that Kara's written statement contradicted their testimony, but he did not call her to impeach them.

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[8] The court sustained the prosecutor's hearsay objection when counsel tried to impeach Krystal with Kara's statement.

Petitioner asserted that these omissions were deficient. Counsel conceded that Kara's written statement could have been used to impeach James's and Krystal's testimony; demonstrated Krystal's bias and motive; and would have enabled counsel to argue that they lied and, in fact, that James was the aggressor (E.H. R.R. 73-75, 79-81). He could not offer a strategic reason for not calling her to testify (E.H. R.R. 75-76, 82).

The trial court concluded that counsel has the discretion whether to call a child witness. Appendix B at 25a. The Court of Appeals recognized that counsel's failure to call Kara was not "clearly within the bounds of sound trial strategy," but held that this decision was consistent with his strategy of "damage control." Appendix A at 17a. It adopted the trial court's finding that calling a child witness could have offended the jury, despite the absence of any empirical evidence.

Kara was 15 years old at the time of the incident. She was not a "child witness" of questionable competency because of her youth. Because Kara was old enough to give the police a sworn, written statement, she was old enough to testify to its contents. Assuming *arguendo* that it can ever be a sound strategy not to call a juvenile whose testimony can help the defense, counsel's decision not to do so here was unsound. Counsel did not testify that he declined to call Kara because she was too young or because he did not want to offend the jury. The trial court created, and the Court of Appeals adopted, a strategic reason that

counsel did not assert and the evidence does not support. Moreover, the Court of Appeals did not explain how failing to call Kara for impeachment is consistent with a so-called "damage control" strategy.

d) Failure To Object To The Prosecutor's Argument That Was Contrary To The Court's Charge[9]

The trial court instructed the jury, with regard to self-defense, to determine whether petitioner's conduct was reasonable as viewed from his standpoint at the time of the incident (C.R. 12-13; AX 6). The prosecutor argued during summation that the jury should consider how a reasonable person in petitioner's situation would have acted instead of whether petitioner reasonably believed that he had to defend himself (2 R.R. 93). Counsel concedes that this argument was contrary to the court's charge and did not help petitioner; he does not remember why he failed to object (E.H. R.R. 85-86).

The prosecutor's argument was contrary to applicable state law and the court's charge. A jury considering self-defense must "view the reasonableness of the defendant's actions solely from the defendant's

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[9] Petitioner acknowledges that this issue implicates the state court's interpretation of state law, whereas the other issues concern the state court's application of *Strickland*. However, he includes it to demonstrate the total failure of counsel's representation.

standpoint." *Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991). The reasonableness of the defendant's belief "must be judged from the standpoint of the accused at the instant he responds to the attack." *Bennett v. State*, 726 S.W.2d 32, 37-38 (Tex. Crim. App. 1986). Accordingly, the prosecutor's argument that the jury must not determine self-defense from petitioner's viewpoint was contrary to the law and the court's charge. Prosecutorial summation that contains a statement of law contrary to the court's charge is improper. *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). Counsel's failure to object to this improper argument constituted deficient performance. *Ex parte Drinkert, supra.*

The Court of Appeals held that the prosecutor's argument correctly stated the law and was consistent with the court's charge because "there is simply no difference between a reasonable person in the shoes of a defendant and a defendant who is required to act reasonably." Appendix A at 19a. It held that counsel was not deficient in failing to object because an objection would have been futile. The court failed to differentiate between the standard of subjective reasonableness required by state law and the court's charge and the standard of objective reasonableness argued by the prosecutor. It erred in holding that this argument was a correct statement of the law and that counsel should not have objected to it, especially given counsel's concession that it was contrary to the court's charge and harmed petitioner.

3. Prejudice

This case involved a credibility choice between petitioner and his ex-wife and her present husband. Trial counsel's deficient performance resulted in the jury hearing inadmissible, prejudicial testimony about petitioner but failing to hear important testimony that would have impeached his ex-wife and her husband. The jury likely convicted petitioner after concluding that he was the aggressor and did not act in self-defense. When counsel's errors are combined with the prosecutor's material misstatement of the law of self-defense during summation, no reasonable court could have confidence in the verdict.

The most damaging evidence that a jury can hear in an assault case is that the defendant is a violent, tempermental person who has previously assaulted others. Counsel failed to object to Krystal's inadmissible testimony that petitioner has a habit of hitting people when he is mad. Even worse, counsel elicited that petitioner physically abused Krystal for 14 years. This testimony destroyed petitioner's credibility and portrayed Krystal as a sympathetic victim instead of a vengeful ex-wife.

Counsel's failure to impeach the key prosecution witnesses prevented the jury from understanding their bias and motive. Krystal and James testified that petitioner injured James by "sucker-punching" him; petitioner denied it. If the jury had a reasonable doubt as to their credibility, it would have acquitted petitioner. The critical issue was whether he punched

James in the nose. Krystal said in her sworn statement that James told her that petitioner missed when he threw a punch. Had counsel impeached Krystal on this point, he would have corroborated petitioner's testimony. Furthermore, the prosecutor's summation – in which she argued that Krystal and James were telling the truth about this crucial issue, *that they never changed their story*, and that petitioner was lying – demonstrates prejudice. Counsel also could have undermined their credibility had he called Kara to testify about Krystal's bias against petitioner and motive to accuse him, and that James told her to shoot petitioner, not *vice versa*, as he and Krystal testified.

Finally, counsel's failure to object to the prosecutor's improper argument, contrary to the court's charge, allowed the jury to determine the self-defense issue without considering whether petitioner's conduct was reasonable from his perspective. This misstatement of the law, uncorrected by counsel, severely undermined the defense.

But for counsel's errors, there is a reasonable probability that the jury would have acquitted petitioner or deadlocked. Had the court overruled timely objections to the inadmissible testimony and the improper argument, there is a reasonable probability that an appellate court would have reversed any conviction. An assault conviction obtained under these circumstances is not worthy of confidence. Accordingly, petitioner is entitled to a new trial.

The Twelfth Court of Appeals ignored this Court's directive in *Strickland* to determine whether trial counsel's explanations for his conduct are sound and supported by the record. This Court should exercise its supervisory powers and summarily reverse the conviction and remand to the Court of Appeals for further action consistent with *Strickland* because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and decided this case in a way that conflicts with relevant decisions of this Court. *Cf. Kaupp v. Texas*, 538 U.S. 626 (2003) (murder conviction summarily reversed where Texas Court of Appeals failed to follow well-settled Supreme Court precedent regarding admissibility of confession); SUP. CT. R. 10(a) and (c). Alternatively, the Court should grant certiorari to determine whether counsel's decision, without petitioner's consent, not to seek an acquittal in an attempt to "control the damage" constituted ineffective assistance.

CONCLUSION

Petitioner requests that the Court grant the petition for a writ of certiorari, summarily reverse the judgment of the Twelfth Court of Appeals, and remand to that court for further action; or, in the alternative, order briefing and oral argument.

Respectfully submitted,

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APPENDIX A

NO. 12-07-00134-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

	§	***APPEAL FROM THE***
	§	***COUNTY COURT***
EX PARTE	§	***AT LAW***
COLIN McANDREW	§	***HOUSTON COUNTY,***
	§	***TEXAS***

MEMORANDUM OPINION

Appellant Colin McAndrew filed an application for a writ of habeas corpus in the trial court after he was convicted of assault. Appellant alleged ineffective assistance of counsel by his trial attorney. After an evidentiary hearing, the trial court denied habeas relief. Appellant appeals the trial court's denial, again arguing, in one issue, that he was denied effective assistance of counsel at trial. We affirm.

BACKGROUND

Appellant was charged with the assault of James Mitchell, the husband of Appellant's ex-wife, Krystal Mitchell. The assault had occurred during an altercation that began when Appellant arrived at Krystal's home to pick up his children for the weekend. A jury found Appellant guilty and assessed punishment of

confinement for one year and a fine of $4,000, probated over two years.

Appellant appealed his conviction. *See* ***McAndrew v. State***, No. 12-03-00297-CR, 2005 WL 674195 (Tex. App. – Tyler Mar. 23, 2005, pet. ref'd) (mem. op., not designated for publication). Among Appellant's issues were complaints that his trial counsel was unconstitutionally ineffective. ***Id.***, at *6. Appellant had filed a motion for new trial, alleging ineffective assistance of counsel. ***Id.***, at *7. However, he had not called counsel as a witness nor had he provided an affidavit from counsel explaining his actions. ***Id.*** We held that "[i]n the absence of a record identifying what trial counsel's reasons may have been for pursuing the chosen course, we must presume the actions were taken deliberately as part of sound trial strategy."[1] ***Id.*** Therefore, we overruled Appellant's ineffective assistance complaints and affirmed his conviction. ***Id.***, at *7-8. Appellant then petitioned the court of criminal appeals for discretionary review, which was refused.

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[1] As we noted in our opinion, "[r]arely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. [(citation omitted)] In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." ***Id.*** (quoting ***Thompson v. State***, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999)).

Appellant filed an application for a writ of habeas corpus, together with a motion for an evidentiary hearing on the application. The sole issue for habeas relief was a claim that Appellant was denied effective assistance of counsel at trial. The trial court denied the writ without a hearing. On appeal, we reversed the trial court's denial and remanded the case to the trial court for a hearing on the writ application. ***Ex parte McAndrew***, No. 12-06-00179-CR, 2006 WL 3086183, at *2 (Tex. App. – Tyler Nov. 1, 2006, no pet.) (mem. op., not designated for publication). This hearing was to afford Appellant the opportunity "to develop testimony to substantiate his claims of ineffective assistance of counsel." ***Id.*** After conducting the required hearing, the trial court again denied Appellant habeas relief. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole issue, Appellant contends that his trial counsel's performance fell below prevailing professional norms, denying him the right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Standard of Review

Applications for Habeas Corpus Relief

An applicant for a writ of habeas corpus bears the burden of proving his factual allegations by a preponderance of the evidence. *See* ***Ex parte Thomas***, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995). In

reviewing the trial court's decision, appellate courts review the facts in the light most favorable to that decision and should uphold it absent an abuse of discretion. ***Ex parte Peterson,*** 117 S.W.3d 804, 819 (Tex. Crim. App. 2003). A trial court does not abuse its discretion when its decision is within the zone of reasonable disagreement. *See* ***Montgomery v. State,*** 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Further, the trial court's decision will be upheld on appeal if it is correct under any provision of the law. ***Ex parte Taylor,*** 36 S.W.3d 883, 886 (Tex. Crim. App. 2001). This principle holds true even where the trial court has given an erroneous reason for its decision. *See* ***Romero v. State,*** 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

In weighing the evidence presented at a habeas hearing, the trial court may accept or reject some or all of any witness's testimony. ***Ex parte Peterson,*** 117 S.W.3d at 819 n.68. Article 11.072 of the Texas Code of Criminal Procedure establishes the habeas procedure in felony and misdemeanor cases in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1 (Vernon 2005). Under article 11.072, if the trial court determines from the face of an application, or documents attached to the application, that the applicant is manifestly entitled to no relief, the trial court shall enter a written order denying the application as frivolous. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 7(a) (Vernon 2005). In any other case, the trial court shall

enter a written order including findings of fact and conclusions of law. ***Id.*** Such written findings of fact are especially helpful to appellate courts in determining whether the trial court has rejected unrebutted testimony as incredible or unworthy of belief. *Ex parte Peterson,* 117 S.W.3d at 819 n.68.

Reviewing courts should "afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." ***Id.*** at 819. Appellate courts also afford that same level of deference to a trial court's ruling on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. ***Id.*** Although we afford almost total deference to a trial court's determination of the historical facts, where a trial court's finding of fact is not supported by the record, appellate courts may hold that the facts are contrary to the finding. *See* ***id.*** at 819 n.67 ("[I]f the trial court's ruling is not supported by the record, this Court may make contrary findings."); ***Ex parte Adams,*** 768 S.W.2d 281, 288 (Tex. Crim. App. 1989) ("If the record will not support the trial judge's [findings], then this Court may make contrary findings."). Accordingly, appellate courts are obligated to determine if the record developed supports the trial court's findings where those findings are relevant to an appellate decision. *See* ***Ex parte Adams,*** 768 S.W.2d at 288. Finally, appellate courts review de

novo those "mixed questions of law and fact" that do not depend upon credibility and demeanor. ***Ex parte Peterson***, 117 S.W.3d at 819.

Ineffective Assistance of Counsel

The standard for testing claims of ineffective assistance of counsel was set out in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and is applicable to this appeal. *See* ***Hernandez v. State***, 726 S.W.2d 53, 54-57 (Tex. Crim. App. 1986). To prevail on a claim of ineffective assistance, an appellant must show that his attorney's representation fell below the standard of prevailing professional norms, and that there is a reasonable probability that, but for the attorney's deficiency, the result of the trial would have been different. ***Strickland***, 466 U.S. at 687-88, 694, 104 S.Ct. at 2064-65, 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***, 466 U.S. at 694, 104 S.Ct. at 2068.

"[A] defendant need ***not*** show that counsel's deficient conduct more likely than not altered the outcome in the case." ***Id.***, 466 U.S. at 693, 104 S.Ct. at 2052 (emphasis added); *see* ***Pennington v. State***, 768 S.W.2d 740, 741 (Tex. App. – Tyler 1988, no pet.). The Supreme Court "found this 'outcome determinative' standard . . . too heavy a burden on defendants, and that its use was not appropriate." ***Nealy v. Cabana***, 764 F.2d 1173, 1178 (5th Cir. 1985) (citing ***Strickland***, [466 U.S. at 693-95], 104 S.Ct. at

2068-69). Instead, "[t]he result of a proceeding can be rendered unreliable . . . even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."[2] ***Strickland***, 466 U.S. at 693, 104 S.Ct. at 2052; *see* ***Doherty v. State***, 781 S.W.2d 439, 442 (Tex. App. – Houston [1st Dist.] 1989, no pet.).

Our review of counsel's representation is highly deferential; we indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. ***Strickland***, 466 U.S. at 689, 104 S.Ct. at 2065. This court will not second guess through hindsight the strategy of counsel at trial, nor will the fact that another attorney might have pursued a different course, without more, support a finding of ineffectiveness. *See* ***id.*** *But see* ***Ex parte Duffy***, 607 S.W.2d 507, 526 (Tex. Crim. App. 1980)

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[2] Generally, an appellant bears the burden of proving, "by a preponderance of the evidence," that counsel was ineffective. *See, e.g.*, ***Thompson***, 9 S.W.3d at 813. However, no such showing may be required to prove the prejudice prong of ***Strickland*** – "that there is a reasonable probability that, but for the attorney's deficiency, the result of the trial would have been different." ***Strickland***, 466 U.S. at 693, 104 S.Ct. at 2052 ("[A] defendant need ***not*** show that counsel's deficient conduct more likely than not altered the outcome in the case."); *see* ***Holland v. Jackson***, 542 U.S. 649, 654-55, 124 S.Ct. 2736, 2738-39 (2004). Therefore, appellate courts should not require a preponderance of the evidence in support of ***Strickland's*** prejudice prong. However, in relation to the first prong of ***Strickland***, the unreasonable deficiency prong, appellate courts should require a preponderance of the evidence.

("Surely at some point 'tactic' becomes an unsatisfactory justification for ineptness. And where silence which results in waiver of potentially reversible error in almost all respects cannot be explained by the practitioner, we are not warranted in excusing his major derelictions."). Further, a reviewing court will not find ineffectiveness by isolating any portion of counsel's representation, but will judge the claim based on the totality of the representation. *See* ***Strickland***, 466 U.S. at 695, 104 S.Ct. at 2069.

Discussion

Appellant complains of five instances in which he alleges that trial counsel's representation fell below the standard of prevailing professional norms. We will discuss the first two together and the others separately.

Failure to Object to Nonresponsive Testimony

Appellant first complains counsel was ineffective for failing to object to Krystal's direct examination testimony that Appellant has a habit of hitting people when he is mad. The testimony was part of Krystal's description of how Appellant's attempt to pick up his children for the weekend had escalated into a fight between Appellant and James, a fight which was, according to Krystal, started by Appellant. The State's question and Krystal's answer were as follows:

> Q: When [Appellant] got out of [his] car what did he do?
>
> A: He got out of his car like he was mad. He got out of the car. I got between – in between – in between he and [James] because *when he's mad he has a habit of hitting people,* [Appellant] does. So I got in between them. (emphasis added)

Krystal's testimony regarding Appellant's propensity for violent conduct was not responsive to the State's question. *See* ***Bowling v. State,*** 122 Tex. Crim. 7, 8-9, 53 S.W.2d 469, 469-70 (1932). Likewise, this testimony was inadmissible character evidence. *See* TEX. R. EVID. 404. Indeed, the State has made no attempt on appeal to argue that this testimony was properly admissible. Had trial counsel made a timely objection that the testimony was nonresponsive and inadmissible character evidence, Appellant would have been entitled to have the testimony stricken and to have the trial court instruct the jury to disregard it. *See* ***Smith v. State,*** 763 S.W.2d 836, 841 (Tex. App. – Dallas 1988, pet. ref'd) (addressing the predicate for objecting to nonresponsive testimony). Nonetheless, trial counsel made no objection.

The second instance complained of occurred later, during Appellant's trial counsel's cross-examination of Krystal. Counsel asked Krystal, "you don't have a good relationship with Mr. McAndrew, do you?" She responded, "No, he abused me for 14 years." The State has made no attempt on appeal to argue that this testimony was properly admissible. Like Krystal's

earlier testimony, this testimony was nonresponsive and inadmissible character evidence. *See* TEX. R. EVID. 404; ***Bowling***, 122 Tex. Crim. at 8-9, 53 S.W.2d at 469-70. Again, however, trial counsel made no objection.

At the habeas hearing, trial counsel was questioned about his failures to object. Counsel testified that Appellant's physical appearance and mannerisms were very harmful to his case. Counsel stated that, based upon Appellant's appearance and mannerisms, he altered his trial strategy to one of "damage control." According to counsel, "I didn't want to draw any more attention to [Appellant] than he had already drawn to himself." Based upon this trial strategy, counsel made the decision each time to not object to Krystal's testimony. As trial counsel explained throughout the habeas hearing,

> . . . you have a client that is sitting there with his sleeves rolled up, leaning forward in his chair, every time he hears something he doesn't like, looking like he's ready to pounce. . . . I assessed the overall credibility of the witnesses and – and my client and his actions, and yes, I determined at some point [that] it was a losing cause. We had to run – to do damage control, keep him out of jail, not inflame the jury anymore [sic] than they were already inflamed by his actions and reactions [that occurred in the courtroom]. . . . I decided during the course of this trial that this jury had made up their mind long before [Appellant] took the stand. . . . [Appellant's]

> hair was a mess. He looked like he had just gotten out – out of bed. His shirt was all wrinkled. It didn't look like it had ever been starched or ironed. He came in. He sat on the edge of his chair. He rolled his sleeves up and he put his arms on the table like he was ready to pounce. . . . His – his skin would flush [red] when he heard something he didn't like. He looked like he was going to get up and pounce. He just had a very bad appearance. We told him not to roll his sleeves up. We told him to sit still, don't be shifting in his chair so much. He wouldn't listen.

The trial court echoed the problematic nature of Appellant's appearance and mannerisms in its written findings of fact, stating that

> [t]rial counsel had a difficult defendant to manage during the trial of the case and he expressed these concerns well during his examination at [the habeas] hearing. A defendant who fails to follow the advise [sic] of counsel in maintaining a proper demeanor during the trial can make it difficult for counsel to present a case successfully to a jury. While trial counsel's performance may not have been perfect in hindsight, it was not [deficient] in any manner. . . .

An appellant bears the burden of proving, by a preponderance of the evidence, that his attorney's representation fell below the standard of prevailing professional norms. *See* ***Thompson,*** 9 S.W.3d at 813. Reading the record before us, we are not in a position,

without more, to judge whether the risk of the jury focusing their view on Appellant outweighed the prejudicial nature of the testimony in question.[3] Appellant has not met his burden to prove that this aspect of trial counsel's representation fell below the standard of prevailing professional norms.[4]

Failure to Impeach with Written Statement

Appellant's third complaint is that his counsel was unconstitutionally ineffective by failing to impeach Krystal and James with a previous inconsistent written statement to the police. The written statement, signed by Krystal, read in pertinent part:

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[3] The second instance of testimony complained of occurred during cross examination. Because Appellant's trial counsel was propounding questions, the jury could have already been looking in Appellant's direction. However, trial counsel, and not this court, could actually see which direction the jury was looking. We also note that despite his appearance, trial counsel offered Appellant as a witness at trial. However, we cannot discern from the record why this decision was made or if Appellant was, perhaps, more willing to follow his attorney's instructions when testifying than when sitting at the counsel table.

[4] This is especially true of the second instance of testimony because of the trial court's written findings. The trial court stated:

> The [trial court] recalls that this second statement, regarding alleged abuse, was spoken by Krystal . . . with a rather sarcastic tone in her voice, not in a manner to bring out empathy from the jury, and in a subdued voice which the jury[,] and perhaps defense counsel[,] may not have actually heard or understood.

> [Appellant] drove up the drive way. . . . [Appellant] got out of the car [and was] yelling at me. . . . James told him to leave and not [to] talk to me that way. *[Appellant] went to the side of me and knock[ed] James to the ground (James says he missed[,] grabbed James by the neck[,] and knocked him to the ground).* . . . (emphasis added).

The information alleged that, on December 14, 2002, Appellant "intentionally, knowingly, or recklessly cause[d] bodily injury to James Mitchell, by striking James Mitchell in the face and head area, causing his nose to be broken and bleeding with other facial injuries." Therefore, the issue of whether Appellant punched James in the face was pivotal to a conviction of Appellant. According to Appellant, counsel's failure to impeach constituted ineffective assistance because the written statement contradicted Krystal's and James's trial testimony that Appellant started the fight in question by punching James in the face.

The outcome of the trial turned on the credibility of the witnesses. Appellant, Krystal, and James were the only witnesses to testify about whether Appellant punched James in the face to start the fight. Both Krystal and James testified that the fight began when Appellant punched James in the face. Appellant testified that he did not punch James in the face and that he acted in self defense. Because the outcome of the trial turned on whether the jury believed Appellant or Krystal and James, passing over the

opportunity to impeach Krystal and James regarding their version of the facts was an omission of a very serious nature.

The trial court stated in its findings of fact and conclusions of law that

> [t]he [written] statement would appear to bolster the [State's] witnesses. . . . The statement is unclear, reasonable people could disagree as to whether the statement would impeach the statements made by [Krystal and James] or not. The decision not to introduce the statement . . . was not outside the range of competent legal counsel.

Taking into account the totality of the representation, the trial court also made the above quoted finding regarding the appearance and mannerisms of Appellant at trial.

Trial counsel testified at the habeas hearing that he was pursuing the above described "damage control" defensive strategy and that failing to use the impeachment evidence was consistent with such a strategy. In reviewing the statement in its entirety, we note that it also included statements that Appellant had not seen his children "for any amount of time for 4 months," was behind on child support, and was using profanity during the incident, thereby bolstering Krystal's and James's similar negative testimony regarding Appellant. Further, while there appears to be a more probable meaning to the written statement, it would not have been impossible for a

witness to explain the words of the statement differently. Also, while we have some ability to weigh the value of this impeachment evidence, our ability is not as great as that of the trial court, who heard live testimony from the witnesses in question. Finally, we are limited to reading the record before us and, therefore, are not in a position, without more, to adequately judge whether trial counsel's damage control defensive strategy, based on Appellant's appearance and mannerisms at trial, was a reasonable strategy or whether such a strategy's implementation was more effective than the potential impeachment value of the written statement. Appellant has not met his burden to prove, by a preponderance of the evidence, that this aspect of trial counsel's representation fell below the standard of prevailing professional norms. *See* ***Thompson***, 9 S.W.3d at 813.

Failure to Call a Child Witness

In Appellant's fourth subissue, he complains that trial counsel provided ineffective assistance of counsel when he failed to call Kara, Appellant and Krystal's daughter, as a witness to impeach Krystal's testimony that unpaid child support was not a reason Krystal had refused to allow Appellant to pick up his children. He also complains that trial counsel provided ineffective assistance when he failed to call Kara as a witness to impeach James's and Krystal's testimony that Appellant told Kara to shoot James with her

mother's rifle during the course of the fight in question.[5] In a witness statement to police given on the day of the offense, Kara stated that Krystal would not let Appellant pick up the children because "he wouldn't pay child support." Kara also wrote in the statement that Krystal "yelled [at her] to go get the rifle" and when she got outside, she "saw my mom yelling at [Appellant and James] to stop [and] James on top of my dad yelling at me to shoot him." Finally, according to Kara's statement, her "mom said 'give me the damn gun,'" and Kara complied.

At trial, Krystal denied that the argument which precipitated the fight in question was related to Appellant's delinquent child support payments and, instead, testified that Appellant had come on the wrong weekend and that she had been apprehensive about letting him pick up the children without first obtaining his new address. Appellant complains that trial counsel should have called Kara to impeach her mother. Trial counsel testified that he and Appellant decided not to call Kara, and contended it was a trial decision, but did not recall the basis for that decision.

At trial, Appellant's trial counsel asked Krystal if James had told Kara to shoot Appellant. Krystal denied that James told Kara to shoot Appellant.

---

[5] During the scuffle, Krystal ordered her daughter, Kara, to retrieve the rifle from their home. An issue at trial, and at the writ hearing, was whether Appellant told Kara to shoot James or James told Kara to shoot Appellant, her own father.

James testified to the same. Although trial counsel admitted that he could have called Kara to impeach Krystal and James, he again explained that he and Appellant had discussed Kara's statement and that "it was a trial decision not to call her." Again, counsel could not recall the basis for that decision.

The trial court found, in its written findings of fact, that

> [t]he decision to call a child or not to call a child [ ] as a witness should be left to the discretion of trial counsel. . . . The decision to place a child of the parties between her parents before a jury must be evaluated carefully. The defendant calling a child to testify where she was not a direct witness to the alleged offense could offend the sensibilities of a juror and harm the credibility of the defendant. The decision not to call this child as a witness was clearly within the bounds of sound trial strategy.

While the evidence in the record does not support that this decision was "clearly within the bounds of sound trial strategy," this evidence also does not support that it was not. There is evidence of the value of calling Kara to testify as well as testimony from trial counsel that Appellant's "damage control" defense was the best defense under the circumstances. Further, we agree with the trial court that calling a child witness could "offend the sensibilities of a juror." We have no direct evidence of why trial counsel chose not to call Kara. Perhaps her father, Appellant,

simply did not want her involved. Without more, we can only speculate. Appellant has not met his burden to prove, by a preponderance of the evidence, that this aspect of trial counsel's representation fell below the standard of prevailing professional norms. *See* ***Thompson***, 9 S.W.3d at 813.

Failure to Object to Closing Argument

In his final complaint, Appellant contends trial counsel rendered ineffective assistance when he failed to object to the prosecutor's closing argument during the guilt-innocence phase of the trial. The jury charge included a self defense instruction that the jury should consider whether it "reasonably appeared to the defendant" "viewed from the standpoint of the defendant at the time," "that his person was in danger of bodily injury. . . ." The State argued during closing argument that

> if you read that law that the judge just gave you about self-defense it tells you that "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself[."] Now, that's the reasonable person's belief, not whether Colin McAndrew believed or not that he needed to do that, but what a reasonable person believed that he needed to do something if that reasonable person were standing in Colin McAndrew's shoes.

Appellant claims that his trial counsel should have objected to this argument as a misstatement of the law. We disagree. The prosecution was correct in stating that the belief would have to be a "reasonable person's belief." Granted, this reasonable person would have to be placed in the shoes of Appellant. However, there is simply no difference between a reasonable person in the shoes of a defendant and a defendant who is required to act reasonably. *See* ***Hudson v. State***, 956 S.W.2d 103, 104-05 (Tex. App. – Tyler 1997, no pet.) ("A person is justified in using force when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. . . . The force used by a defendant must be reasonable as contemplated from the defendant's point of view."); *see also* ***Ex parte Drinkert***, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991) (plurality opinion) ("The law of self-defense and defense of property requires the jury to view the reasonableness of the defendant's actions solely from the defendant's standpoint."). Any objection to the prosecution's closing argument would have been pointless and trial counsel was not ineffective by failing to make an objection.

Conclusion

We have held that Appellant has not sufficiently proved that his trial counsel's representation fell below the standard of prevailing professional norms. Therefore, we hold that the trial court did not err in

denying Appellant's writ of habeas corpus application. We overrule Appellant's sole issue.

DISPOSITION

We ***affirm*** the trial court's denial of the writ of habeas corpus.

SAM GRIFFITH
Justice

Opinion delivered January 31, 2008.
Panel consisted of Worthen, C.J., Griffith, J., Hoyle, J.

(DO NOT PUBLISH)

APPENDIX B

CAUSE NO.: 02-12-00391-A
Application for Writ of Habeas Corpus

STATE OF TEXAS	**IN THE COUNTY COURT-AT-LAW**
VS	**OF**
COLIN MCANDREW	**HOUSTON COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Mar. 7, 2007)

Applicant, Colin Mc Andrew has filed an Application for Habeas Corpus pursuant to Article 11.072 Code of Criminal Procedures.

An evidentiary hearing was held on the Application on December 15, 2006, the defendant filed proposed findings of fact and the State filed proposed findings of fact. Based on the evidence heard, a thorough review of the Reporter's Record and the Court's personal recollection of the trial, the Application for Habeas Corpus relief is DENIED.

The first argument presented by counsel was that the defendant, after the trial, took a polygraph in which the defendant stated he acted in self-defense. The polygraph examination was not admitted and found to be irrelevant to this Application. A defendant may state that he was acting in self-defense and in his mind may actually believe this

statement, however, the jury may conclude otherwise as it did in this case. This shows no error in the jury verdict.

The second argument presented by counsel was that the defendant was denied effective assistance of legal counsel. This argument seems to be similar to the same argument made on direct appeal. However, as this Court has been directed to proceed with the Application for Habeas Corpus the Court will review the arguments presented. At the hearing on the Application for Habeas Corpus, Timothy Salley who was trial counsel was subpoenaed, traveled from the Panhandle of Texas, appeared and was thoroughly questioned by the counsel for the defendant on this Application for Habeas Corpus. As the trial occurred August 27, 2003, Timothy Salley, who had only briefly reviewed the file, did not have a complete recollection of the trial or each decision he made during the trial.

The first part of this argument centers on whether or not Colin McAndrew was denied effective assistance of counsel by the failure to object to statements made by Krystal Mitchell during her testimony at trial. The first statement was made on page 27-28 of the trial record during direct examination by the County Attorney:

> "Q. When he got out of the car what did he do?
>
> A. He got out of the car like he was mad. He got out of the car. I got between – in between – in between he and my

husband because *when he's mad he has a habit of hitting* people, Collin [sic] does. So I got in between them."

The second statement was made on page 38 during cross examination by Timothy Salley, following a discussion before the bench in which the County Attorney objected to questioning Krystal Mitchell about a previous occasion in which she was arrested during an exchange of the children. The Court overruled the objection and permitted the examination on the grounds that the state had already introduced evidence of the poor relationship between the ex-spouses during exchanges of the children:

"Q. Ms, Mitchell, you don't have a good relationship with Mr. McAndrew, do you?

A. No, *He abused me for 14 years.*

Q. In fact, the police have been out on – on occasion when you've exchanged children?

A. Yes.

Q. In fact, one – you have been arrested for cursing the police, haven't you?"

While these statements may have been objectionable, the decision had to be made by counsel at that moment during trial, whether to stop the trial and make an objection, whether to continue the trial and not additionally emphasize the statement or whether it might assist the defensive theory that Colin McAndrew and Krystal Mitchell had a poor relationship as

ex-spouses. Throughout the trial defense counsel consistently asserted the bad relationship between the parties to imply to the jury that this was another example of that poor relationship. He emphasized that both parties were responsible for the bad relationship. And that now that James, Krystal's new husband had teamed up with her that Colin McAndrew might feel threatened. The Court recalls that this second statement, regarding alleged abuse, was spoken by Krystal Mitchell with a rather sarcastic tone in her voice, not in a manner to bring out empathy from the jury, and in a subdued voice which the jury and perhaps defense counsel may not have actually heard or understood. By proceeding with the attack on her credibility due to her arrest for disorderly conduct during a prior exchange of the children counsel did attack the credibility of this witness. In light of all the circumstances, the identified acts or omissions were not outside the range of professionally competent assistance.

The second part of the argument on ineffective assistance of counsel questions counsel's failure to impeach Krystal and James Mitchell with Krystal's prior inconsistent written statement to the police. From a review of the written statement made by Krystal Mitchell to the police, it is unclear how the introduction of the statement would clearly impeach the statement made at trial. The statement emphasizes that Colin McAndrew was threatening to take the children without telling their mother where they were going, that he was cursing at her and that

James asked Colin McAndrew to leave before the altercation occurred. The statement would appear to bolster the state's witnesses. The inconsistent statement is unclear, Krystal wrote: "Colin went to the side of me and knock James to the ground (James says he missed grabbed James by the neck and knocked him to the ground) Colin would not stop". Counsel for the defendant on the writ argues that this statement indicates that Colin McAndrew did not initially hit James in the nose. The statement is unclear, reasonable people could disagree as to whether the statement would impeach the statements made by the witnesses or not. The decision to not introduce the statement for impeachment was not outside the range of competent legal counsel.

The third part of the argument on ineffective assistance of counsel challenges trial counsel's decision not to call Kara McAndrew, the 15-year-old daughter of Colin McAndrew and Krystal Mitchell, as a witness in the case. The decision to call a child or not to call a child, as a witness should be left to the discretion of trial counsel. Again the statement made by Kara McAndrew to the police could be used to bolster the state's witnesses. The statement clearly states that the first time she looked out the window her dad was on top of her step-dad, James Mitchell, on the ground. The next time she went out her step-dad was on top of her dad. The written statement is unclear and does not clearly impeach the state's witnesses on the statements made regarding the occurrence of the assault. The decision to place a

child of the parties between her parents before a jury must be evaluated carefully. The defendant calling a child to testify where she was not a direct witness to the alleged offense could offend the sensibilities of a juror and harm the credibility of the defendant. The decision not to call this child as a witness was clearly within the bounds of sound trial strategy. The fourth part of the argument of ineffective assistance of counsel challenges trial counsel's failure to object to the prosecutor's closing argument. In the application counsel is not clear where the actual error was and where the objection should have been made by trial counsel. The jury in a self-defense case employs an objective standard to determine the reasonableness of the defendant's belief, but must view the facts from the defendant's perspective. While trial counsel may have objected to the manner in which trial counsel [the prosecutor] presented this argument, the argument is not so clearly erroneous to find error in the decision to object or not object to the closing argument. The jury was given the correct instructions in the charge and there is no evidence that the jury did not follow those instructions.

Trial counsel had a difficult defendant to manage during the trial of the case and he expressed these concerns well during his examination at this evidentiary hearing. A defendant who fails to follow the advise [sic] of counsel in maintaining a proper demeanor during the trial can make it difficult for counsel to present a case successfully to a jury. While trial counsel's performance may not have been perfect

in hindsight, it was not deficit [deficient] in any manner, which caused Colin McAndrew not to have a fair trial.

The jury reached a fair verdict. The defendant cannot show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant, Colin McAndrew, received a fair trial that produced a verdict worthy of confidence. The application for habeas corpus is denied and the defendant is denied a new trial.

Signed this 6 day of March, 2007.

/s/ Sarah Tunnell Clark
Sarah Tunnell Clark,
Presiding Judge

APPENDIX C

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Wednesday, May 14, 2008 [Stamped May 19, 2008]
Re: Case No. PD-0289-08
COA#: 12-07-00134-CR
STYLE: MCANDREW, EX PARTE COLIN

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

JOSH SCHAFFER
THE SCHAFFER FIRM
1301 MCKINNEY SUITE 3100
HOUSTON TX 77010